

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02839-JLK-MJW

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL VAN GILDER and
ROGER PARKER

Defendants,

and

STEPHEN DILTZ,

Relief Defendant.

SECOND AMENDED COMPLAINT

Plaintiff Securities and Exchange Commission (“Commission”), for its Second Amended Complaint (“Complaint”) against defendants Michael Van Gilder (“Van Gilder”) and Roger Parker (“Parker”), and relief defendant Stephen Diltz (“Diltz”), alleges as follows:

SUMMARY

1. This case concerns insider trading in the securities of Delta Petroleum Corporation (“Delta”) in advance of the December 31, 2007 announcement that Tracinda Corporation (“Tracinda”) had agreed to purchase a 35 percent stake in Delta for \$684 million (the “Tracinda Announcement”).

2. During the weeks leading up to the Tracinda Announcement, Parker, who was then the chief executive officer (“CEO”) of Delta, tipped his close friend Van Gilder and at least one other friend (“Friend A”) with material nonpublic information concerning Tracinda’s impending investment in Delta.

3. Based on this material nonpublic information, Van Gilder purchased Delta shares and options for his own account, and tipped his relatives and a co-worker to purchase Delta securities as well. Additionally, for purposes of executing certain trades in Delta shares, Van Gilder communicated with his broker, Diltz, who (in addition to placing trades for Van Gilder’s account) also purchased Delta securities for his own personal accounts. After the Tracinda Announcement, Delta’s stock price jumped almost 20 percent and Van Gilder, one of his relatives, and his co-worker, made more than \$110,000 in ill-gotten profits. As a result of his trading, Diltz profited by approximately \$51,000.

4. In addition, in early November 2007, Van Gilder had purchased Delta securities based on material nonpublic information he received from Parker concerning the company’s then upcoming third quarter 2007 earnings announcement, which took place on November 8, 2007. Van Gilder held these shares until the Tracinda Announcement and reaped approximately \$4,000 when news of the investment became public.

NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT

5. The Commission brings this action pursuant to the authority conferred upon it by Section 21(d) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78u(d)]. The Commission seeks permanent injunctions against Van Gilder and

Parker, enjoining them from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint, disgorgement of all profits or other ill-gotten gains generated as a result of the unlawful insider trading activity set forth in this Complaint, together with prejudgment interest, and civil penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. In addition, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], the Commission seeks an order barring Parker from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]. Finally, the Commission seeks any other relief the Court may deem appropriate pursuant to Section 21(d)(5) of the Exchange Act [15 U.S.C. § 78u(d)(5)].

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

7. Venue lies in this Court pursuant to Sections 21(d), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u-1, and 78aa]. Certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within the District of Colorado. Van Gilder and Parker both resided in Colorado in November and December 2007, Delta's headquarters were located in Colorado during the relevant time, and many of the alleged communications of material nonpublic information occurred while Van Gilder and/or Parker were physically located in Colorado.

DEFENDANTS

8. **Van Gilder**, age 46, resides in Denver, Colorado. From 2006 through

October 2012, shortly before the Commission filed its initial complaint in this action, he was the chief executive officer and a board member of the Denver-based Van Gilder Insurance Company (“VGIC”). During the relevant period, Van Gilder and Parker were close friends, had known each other for several years, and frequently socialized together.

9. **Parker**, age 52, resides in Englewood, Colorado. From July 2005 until May 2009, he was the CEO of Delta and the chairman of its board of directors. In November 2009, he became the president, CEO and chairman of the board of directors of Recovery Energy, Inc., an independent oil exploration company based in Denver. In November 2012, shortly after the Commission filed its initial complaint in this action, Parker resigned from Recovery Energy, Inc.

RELIEF DEFENDANT

10. **Diltz**, age 45, resides in Clarendon Hills, Illinois. At all relevant times, Diltz was Van Gilder’s broker and was a senior financial advisor at a financial services firm. Diltz holds Series 7, 63, and 65 licenses.

OTHER RELEVANT ENTITIES

11. **Delta** was a Delaware corporation based in Denver, Colorado that engaged in the exploration, acquisition, development, production and sale of natural gas and crude oil. In December 2011, Delta filed for bankruptcy. In August 2012, the reorganized company, Par Petroleum, emerged from bankruptcy. Delta’s securities were registered pursuant to Section 12(b) of the Exchange Act and, prior to Delta’s bankruptcy, its common stock traded on the Nasdaq under the symbol “DPTR.” Delta had internal policies protecting its confidential information.

12. **Tracinda** is a private investment company owned by billionaire Kirk Kerkorian. Tracinda is headquartered in Beverly Hills, California. Tracinda has at times owned large portions of prominent U.S. companies such as MGM Resorts International, General Motors, and Ford Motor Company.

FACTS

13. As detailed below, from late November 2007 through December 31, 2007, Parker was in possession of material nonpublic information concerning Tracinda's impending investment in Delta, including but not limited to Tracinda's interest in pursuing the investment, negotiations between the parties, and the activities of Delta's board of directors. During this same time, Van Gilder and Parker had frequent contact and communications which included numerous telephone calls, text messages, and face-to-face meetings.

14. During the weeks leading up to the December 31, 2007 announcement of Tracinda's agreement to invest \$684 million in Delta, Parker conveyed material nonpublic information to Van Gilder and Friend A about the impending investment. While in possession of this material nonpublic information, Van Gilder contacted his broker, Diltz, and requested that Diltz purchase Delta securities for Van Gilder's brokerage account. In addition, Van Gilder conveyed material non-public information to his relatives and a co-worker, and one of his relatives and the co-worker then traded based on the material nonpublic information. Following Van Gilder's communications with Diltz, Diltz purchased Delta securities in his own personal accounts. As a result of this trading, Van Gilder, one of his relatives, and his co-worker generated more than \$110,000 in ill-gotten profits. As a result of his trading, Diltz profited by approximately

\$51,000. Friend A also purchased Delta securities after receiving material nonpublic information concerning the Tracinda investment from Parker and reaped trading profits of over \$730,000.

Insider Trading in Advance of the Tracinda Announcement

15. In late November 2007, Parker learned of Tracinda's interest in potentially making a substantial equity investment in Delta and tipped this material nonpublic information to Van Gilder and Friend A.

16. On Monday, November 26, 2007, shortly after Parker learned of Tracinda's interest in making an investment in Delta, Van Gilder purchased 1,750 shares of Delta stock. This purchase followed a weekend during which Van Gilder and Parker exchanged 47 text messages and six telephone calls.

17. Two days later, on November 28, 2007, Parker conveyed material nonpublic information concerning Tracinda's interest in making an investment in Delta to Friend A. Minutes after speaking with Parker via telephone, Friend A arranged to purchase 11,300 shares of Delta stock and 1,000 Delta call options¹ with a strike price of \$17.50 and an expiration date of March 2008. At the time, Delta's stock price was approximately \$13.60.

18. On December 3, 2007, Parker and others met with Tracinda management in Las Vegas, Nevada to discuss Delta's business and the potential investment. That same day, Parker placed a telephone call to Friend A and conveyed

¹ A call option is a financial contract between two parties that gives the buyer the right, but not the obligation, to buy an agreed quantity of stock during a specified time period for a specified price, known as the strike price. A buyer pays a fee, or premium, to purchase this right. A buyer of a call option generally stands to gain if the price of the stock increases.

material nonpublic information concerning the potential Tracinda investment. Following the telephone call, Friend A arranged to buy an additional 500 Delta call options.

19. Shortly after speaking with Parker again in mid-December 2007, Friend A purchased 500 more Delta call options on December 14, 2007.

20. On the morning of Saturday, December 8, 2007, just days after Parker's first face-to-face meeting with Tracinda, Van Gilder and Parker exchanged five text messages. About one hour after this exchange of text messages, Van Gilder emailed his broker, Diltz, stating: "I want to buy as much Delta as possible. Let's talk Monday." On Monday, December 10, at Van Gilder's instruction, Diltz purchased 4,000 shares of Delta stock for Van Gilder's account.

21. Also on December 10, 2007, following his Delta purchase, Van Gilder telephoned a relative ("Relative A"), and the two spoke for twelve minutes. During this telephone call, Van Gilder advised Relative A to purchase Delta securities. Two minutes after the conclusion of that call, Relative A called a broker and purchased 500 shares of Delta stock.

22. On December 17, 2007, following additional communications between Parker and Tracinda, the Delta board of directors was informed of Tracinda's interest in making an investment in Delta and the board of directors authorized Delta's management to pursue discussions with Tracinda.

23. Hours after Delta's board of directors authorized Delta's management to pursue discussions with Tracinda, Parker, who had participated in the board meeting, and Van Gilder exchanged 13 text messages. The next day, Tuesday, December 18, Van Gilder called Diltz and instructed a bank to wire \$40,000 to a brokerage account that

Diltz maintained for Van Gilder. On the morning of Wednesday, December 19, at about the same time that the wired money arrived at the brokerage, Diltz, on Van Gilder's instruction, purchased 200 Delta call options with a strike price of \$20 and an expiration date of March 2008 for Van Gilder's account. At the time, Delta's stock price was approximately \$14.65. Prior to these purchases, Van Gilder possessed material nonpublic information regarding Tracinda's impending investment in Delta that he received from Parker.

24. Following telephone calls and emails with Van Gilder, Diltz began purchasing Delta stock and call options for his own personal accounts on December 17 and December 18. The call options that Diltz purchased for himself had the same strike price and expiration date as the options he purchased on Van Gilder's behalf. In addition, early in the morning on December 19, a co-worker of Van Gilder's at VGIC, who had participated in a one-on-one meeting with Van Gilder on December 18, purchased 300 shares of Delta stock.

25. On December 19, 2007, Tracinda formally advised Delta that it was willing to purchase an approximately one-third interest in Delta for \$17.00 per share. On December 22, 2007, Tracinda formally communicated a revised offer to purchase a 35 percent stake of Delta for \$19.00 per share.

26. On or about December 22, 2007, the day on which Tracinda formally communicated its revised offer to Delta, Parker further tipped material nonpublic information concerning the Tracinda investment to Van Gilder. On the morning of December 22, Parker spoke to Van Gilder via telephone. Two minutes later, Van Gilder emailed Relative A and another relative ("Relative B"), under the subject "Xmas

present,” writing, “my present (just kidding) is that I can’t stress enough the opportunity right now to buy Delta Petroleum. Something significant will happen in the next 2-4 weeks.” Relative A replied that he had already purchased Delta securities. When Relative B replied asking for further details regarding this information, Van Gilder answered, “[c]all me, prefer not to have in email.”

27. Following additional telephone calls with Parker on December 22, Van Gilder emailed Diltz, asking, “Are you available to talk tomorrow? I’d like to visit on Delta. Please let me know.” That same evening, Van Gilder spoke to Diltz via telephone. The next trading day, Monday, December 24, 2007, at Van Gilder’s instruction, Diltz purchased 3,000 shares of Delta stock and 90 Delta call options with a strike price of \$20 and an expiration date of January 2008 for Van Gilder’s account. At the time, Delta’s stock price was approximately \$15.65.

28. On December 26 and 27, 2007, Delta’s board of directors met to review Tracinda’s revised offer. Delta’s board of directors approved the revised offer on December 29, 2007.

29. On the morning of December 28, 2007, as Delta and Tracinda were finalizing the terms of Delta’s proposed investment, Parker and Van Gilder exchanged nine text messages. Later that day, Van Gilder wired more than \$270,000 to his brokerage account. On the morning of December 29, after Diltz confirmed that the funds had arrived, Van Gilder instructed Diltz to “get it on Delta asap.”

30. On December 31, 2007, before market open, Delta announced that Tracinda had agreed to acquire a 35 percent stake in Delta for \$684 million, a price that represented a premium of 23 percent to Delta’s closing price of \$15.51 on the preceding

trading day, December 28, 2007. In reaction to the Tracinda Announcement, the price of Delta's stock rose \$3.34 or approximately 19% on December 31 and closed at \$18.85.

31. On the day of the Tracinda Announcement, Diltz, following Van Gilder's instructions, purchased 4,000 shares of Delta stock and 114 Delta call options for Van Gilder. Because these purchases were not executed until after the news of Tracinda's investment had been at least partially digested by market participants, the trades were not as profitable as Van Gilder's earlier purchases of Delta securities. Nevertheless, Van Gilder's realized and unrealized trading profits from all of the Delta trading noted above totaled approximately \$109,000, and his tippees' combined trading profits totaled approximately \$1,500. Diltz's trading profits totaled approximately \$51,000.

32. Parker's other tippee, Friend A, reaped profits of over \$730,000 from trading on material nonpublic information concerning the Tracinda investment that Friend A received from Parker.

Van Gilder Engages in Insider Trading in Advance of Delta's Third Quarter 2007 Earnings Announcement

33. The days and weeks leading up to the Tracinda Announcement were not the only instances in which Parker tipped material nonpublic information to Van Gilder.

34. On November 5, 2007, Van Gilder received an email from a friend who was also friends with Parker. The email included a news article that expressed a negative view of Delta's future prospects. Later that day, Van Gilder forwarded the article to Diltz indicating that Van Gilder might want to sell the Delta securities that he owned at the time.

35. Van Gilder later called Parker and the two spoke for a total of 13 minutes on three separate calls during the evening of November 5, 2007. During these communications, Parker conveyed material nonpublic information to Van Gilder regarding Delta's third quarter 2007 earnings results, which were scheduled to be announced on Thursday, November 8, 2007. The next morning, rather than sell his Delta stock, Van Gilder purchased an additional 1,250 shares and responded to the above-noted email from his friend by stating: "I had a dialogue with a friend, of whom you know. Do not sell this stock, rather buy more . . . Delta will hit their numbers at this Thursday's announcement."

36. On Thursday, November 8, 2007, Delta announced its earnings for the third quarter of 2007. Delta reported production and revenue numbers that were above the company's previously stated guidance, and a net loss of \$.10 per share, which was better than the \$.11 per share loss estimated by analysts.

37. Van Gilder did not make an immediate profit from his November 6, 2007 purchase of Delta stock as the company's share price remained fairly constant following the November 8, 2007 earnings announcement. However, because Van Gilder continued to hold these shares through the Tracinda Announcement on December 31, 2007, he made approximately \$4,000 on these trades when Delta's stock price rose sharply in response to the Tracinda Announcement.

Van Gilder and Parker Acted with Scienter

38. Parker learned the material nonpublic information that he provided to Van Gilder and Friend A as a result of his position as Delta's CEO, and he knew, recklessly disregarded, or should have known, that he owed a fiduciary duty, or

obligation arising from a similar relationship of trust and confidence, to keep the information confidential.

39. At all relevant times, Van Gilder knew of Parker's status as a corporate insider. Van Gilder knew, recklessly disregarded, or should have known that the information he received from Parker regarding Tracinda's investment in Delta was material and nonpublic and he knowingly or recklessly traded on the basis of that information and tipped others to do so. Van Gilder knew, recklessly disregarded, or should have known that Parker breached his fiduciary duty or a duty of trust and confidence to Delta and its shareholders.

CLAIMS FOR RELIEF

CLAIM I

Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder (Against Van Gilder and Parker)

40. The Commission realleges and incorporates by reference paragraphs 1 through 39, as though fully set forth herein.

41. The information that Parker tipped to Van Gilder and Friend A was, in each case, material and nonpublic. In addition, the information was considered confidential by Delta, the company that was the source of the information, and Delta had policies protecting confidential information.

42. Parker tipped material nonpublic information to Van Gilder and Friend A in breach of the fiduciary duty that he owed to Delta and its shareholders, and did so with the expectation of receiving a benefit.

43. Van Gilder knew, recklessly disregarded, or should have known, that Parker owed a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to keep the information confidential.

44. Van Gilder knew, recklessly disregarded, or should have known, that the material information that he received from Parker was disclosed or misappropriated in breach of a fiduciary duty or obligation arising from a similar relationship of trust and confidence.

45. Van Gilder purchased Delta securities on the basis of the material nonpublic information that he received from Parker.

46. Van Gilder also tipped material nonpublic information to his relatives and a co-worker, with the expectation of receiving benefits.

47. By virtue of the foregoing, defendants Van Gilder and Parker, in connection with the purchase or sale of securities, by the use of the means or instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange, directly or indirectly: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices or courses of business which operated or would have operated as a fraud or deceit upon persons.

48. By virtue of the foregoing, Van Gilder and Parker, directly or indirectly, violated, and unless enjoined, will again violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

CLAIM II
Unjust Enrichment
(Against Diltz)

49. The Commission realleges and incorporates by reference paragraphs 1 through 39, as though fully set forth herein.

50. Relief defendant Diltz obtained the funds described above as part of Van Gilder's securities violations alleged above, and under circumstances in which it is not just, equitable or conscionable for Diltz to retain the funds. As a result of the foregoing, Diltz was unjustly enriched.

RELIEF SOUGHT

WHEREFORE, the Commission respectfully requests that this Court enter a Final Judgment:

I.

Permanently restraining and enjoining defendants Van Gilder and Parker from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

II.

Ordering defendants Van Gilder and Parker to disgorge, with prejudgment interest, all illicit trading profits, other ill-gotten gains received, and/or losses avoided as a result of the conduct alleged in this Complaint, including, as to each of the Defendants, their own illicit trading profits, other ill-gotten gains, and/or losses avoided, and, on a joint and several basis, the illicit trading profits, other ill-gotten gains, and/or losses avoided of their direct and downstream tippees;

III.

Ordering defendants Van Gilder and Parker to pay civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1];

IV.

Barring defendant Parker, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)];

V.

Ordering relief defendant Diltz to disgorge all funds he obtained by which he was unjustly enriched, and to pay prejudgment interest thereon; and

VI.

Granting such other and further relief as this Court may deem just and proper.

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JURY DEMAND

The Commission demands a jury trial in this matter.

Dated: February 26, 2014

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